UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

FEB 15 2007

Honorable John A. Hughes, Secretary
Delaware Department of Natural Resources
and Environmental Control
89 Kings Highway
Dover, DE 19901

Dear Secretary Hughes:

The Delaware Department of Natural Resources and Environmental Control (DNREC) finalized revisions to its National Pollutant Discharge Elimination System (NPDES) regulations by Secretary's Order No.: 2003-W-0017, which was signed on March 26, 2003. The final regulation revision appeared in the Delaware Register of Regulations on May 1, 2003, and became effective on May 14, 2003. The State's Attorney General's office certified on November 19, 2003 that these revisions were duly adopted pursuant to State law, and that Delaware law provides adequate authority to implement the revisions.

Delaware's NPDES regulations, known as the Regulations Governing the Control of Water Pollution, were submitted to the United States Environmental Protection Agency (EPA) on July 22, 2003. EPA Region III has completed its review of Delaware's new and revised NPDES regulations and, with concurrence from the EPA Headquarters Office of Water and the Water Enforcement Division in the Office of Enforcement and Compliance Assurance, is hereby approving the new and revised portions of the State of Delaware's NPDES submittal as consistent with the requirements of the Clean Water Act and its implementing regulations at 40 CFR Sections 122, 123 and 124. Federal regulations at 40 CFR Section 123.25 specify the provisions which a state must have the legal authority to implement in order to be authorized to administer the NPDES program. Enclosure 1 to this letter provides a comparison of the authorities required by Federal regulations and the location of analogous authorities in Delaware's NPDES regulations.

The State made significant revisions to Sections 1 through 8 and Sections 10 through 13 of its NPDES regulations, and EPA Region III determined that DNREC's revisions constituted a substantial revision of Delaware's authorized NPDES program. Therefore, EPA Region III solicited public comments pursuant to Federal regulations at 40 CFR Section 123.62(b)(2) as to whether it should approve or disapprove the revisions. EPA received no comments in response to the public notice.

As part of EPA's obligation under the Endangered Species Act (ESA), EPA prepared a biological evaluation to determine if its approval of the revised Regulations Governing the Control of Water Pollution will adversely affect threatened and endangered species and their critical habitat in Delaware. Our biological evaluation found that our approval would not adversely affect threatened or endangered species. We shared this evaluation with the Fish and Wildlife Service and the National Marine Fisheries Services and they concurred with our finding on October 9, 2003 and November 7, 2003, respectively. We are enclosing a copy of the evaluation (Enclosure 2) for your information. The completion of the biological evaluation and concurrence from the Services fulfills our obligation under Section 7 of the ESA regarding this Federal action.

We commend DNREC for its efforts to amend and adopt its NPDES regulations, and we would now like to propose reviewing and updating, if necessary, the NPDES Memorandum of Agreement between DNREC and EPA. This document was last updated on May 4, 1983. We look forward to working with you and your staff on any further modifications to Delaware's NPDES permit program. If you have any questions, please feel free to contact me or have your staff contact Evelyn MacKnight, Chief of the NPDES Permits Branch, at (215) 814-5717.

Sincerely,

for Donald S. Welsh
Regional Administrator

Enclosures (2)

cc: Kevin C. Donnelly (DNREC)
Peder Hansen (DNREC)

Enclosure 1

ENVIRONMENTAL PROTECTION AGENCY, REGION III
STATE OF DELAWARE
REGULATIONS CONCERNING THE CONTROL OF WATER POLLUTION

Federal NPDES Regulations as established at 40 CFR 123.25 that are required for State authorized NPDES programs	Corresponding Delaware Code (Regulations Concerning the Control of Water Pollution)
122.4 Prohibitions	6.13
122.5(a) and (b) Effect of permit	6.20(b)(1) [1]
122.7(b) and (c) Confidential information	6.32, 7 Del. C. § 6014
122.21(a)-(b),(c)(2),(e)-(k) and (m)-(p) Application for a permit	6.10(d)
122.22 Signatories	6.11(a),(c),(e)
122.23 CAFOs	6.61
122.24 Concentrated aquatic animal production facilities	6.62
122.25 Aquaculture projects	6.63(e)
122.26 Storm water discharges	Section 9, General Permit Program [2]
122.27 Silviculture	6.65
122.28 General permits	Section 9, General permit program [2]
122.41 Applicable permit conditions	6.17(f), 6.40(b), 6.41(c) [1]
122.42 Conditions applicable to specified categories of permits	6.14 (f), 6.44(a)
122.43 Establishing permit conditions	6.21(a)(b), 6.17, 6.40(e)

122.44 Establishing NPDES permit conditions	6.15(i),(k),(l),(h), 6.40(a)
122.45 Calculating permit conditions	6.16(a)(1-3), (b), (c), (h), (e), (g)(1)(i), (g)(5), (i)
122.46 Duration	6.21(a)(b)
122.47(a) Schedules of compliance	6.17
122.48 Monitoring requirements	6.40(e)
122.50 Disposal into wells	6.16
122.61 Permit transfer	6.21(c), 4.10(c)
122.26 Permit modification	6.51
122.64 Permit termination	6.10
124.3(a) Application for a permit	6.10(a)
124.5(a)(c)(d) and (f) Modification of permits	6.51 (e)(5), 6.52 [3]
124.6 (a)(c)(d) and (e) Draft permit	6.12
124.8 Fact sheets	6.18
124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b),(c), (d) and (e) Public notice	6.30
124.11 Public comments and requests for hearings	6.33
124.12(a) Public hearings	6.33
124.17 (a) and (c) Response to comments	6.35
124.56 Fact sheets	6.18(b)(9)
124.57 (a) Public notice	6.30(a),(b),(c)
124.59 Comments from government agencies	6.35(a),(b),(c)
124.62 Decision on variances	6.22

Subparts A, B, C, D, H, I, J, K and L of part 125	6.22(d)
40 CFR parts 129, 133 and subchapter N	6.15, Section 7
For Great Lakes State or Tribe - 40 CFR part 132 (NPDES permitting	N/A

[1] Sewage sludge is regulated under Delaware's "Guidance and Regulations Governing the Land Treatment of Wastes in Delaware"

[2] Section 9 was not part of this modification

[3] 404 permits are regulated under Delaware's "Regulations Governing the Use of Subaqueous Lands" regulation.

Biological Evaluation
for the Approval of
the State of Delaware
Department of Natural Resources and Environmental Control
Regulations Governing the Control of Water Pollution
by EPA Region III
under Clean Water Act 402 and 40 CFR 123 Subpart D

Federal Action:

The federal action being evaluated is the approval by the Environmental Protection Agency(EPA) of the revised "Regulation Governing the Control of Water Pollution" for the State of Delaware. These regulations, which deal with the state's administration of the National Pollutant Discharge Elimination System (NPDES) permits, were amended by the state on May 14, 2003.

Regulatory Background on Delaware's NPDES regulations:

Delaware's Department of Natural Resources and Environmental Control (DNREC) amended its regulations governing the control of water pollution on May 14, 2003. The regulations were originally adopted and became effective on March 15, 1974. They were also amended on June 23, 1983, June 30, 1993, and September 15, 1998. A public hearing to solicit comments on the proposed regulations was held on August 29, 2000.

Action Area:

The area evaluated for action is the State of Delaware including the three counties: New Castle, Kent and Sussex. In particular, these regulations "seek to prevent, manage and/or control the pollution from activities that affect or have the reasonable potential to affect the quality" of Delaware's surface and ground waters. This evaluation will focus only on the portions of the regulation governing discharges to surface waters, and particularly on the May 14, 2003, changes to the regulation.

List of Federally-Listed Species Which May be Found Within the Action Area:

The attached list includes all threatened and endangered species compiled by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) for the State of Delaware as of June 2003. The species listed include plants, mollusks, fish, reptiles, birds, and mammals. The level of information for each species varies. In some cases the distribution of the species in the state is known; in other cases there are no recent records of the species in the State. However, as the regulations apply statewide, the actual distribution of the species is irrelevant, but will be noted.

Plants:
Of the seven plants listed, only three have a record of currently being found in Delaware. The three plants listed, all as threatened, are the swamp pink (*Helonius bullata*), the small-whorled pogonia (*Isotria medeoloides*) and the seabeach amaranth (*Amaranthus pumilus*).

The swamp pink, found throughout the entire State, grows in a wetland habitat. It is threatened primarily by development and construction and draining and filling of wetlands. Site conservation will be the primary way to recover the swamp pink.

The small-whorled pogonia is found in New Castle County, generally in open, dry, deciduous woods with acid soil. Its threatened status is attributed to loss of habitat and overutilization for scientific and private collections, although some populations have declined for unknown reasons. Management needs are unknown at this time.

The seabeach amaranth is found on Atlantic coastal beaches, primarily in Sussex County. The most serious threats to its continued existence are construction of beach stabilization structures, beach erosion and tidal inundation, beach grooming, herbivory by insects and feral animals, and, in certain circumstances, by off-road vehicles. The largest remaining populations are located on publicly owned lands where they can be protected from beach armoring.

Mollusks:
The only mollusk listed, as endangered, is the dwarf wedge mussel (*Alasmidonta heterodon*). There are, however, no records of the dwarf wedge in Delaware after 1939. Therefore, this species is not considered in this biological evaluation.

Fish:
The shortnose sturgeon (*Acipenser brevirostrum*) is the only fish listed as endangered in Delaware. The NMFS has a recovery plan for protection of the shortnose sturgeon that was finalized in December 1998. The recovery plan lists pollution and overfishing as the principal reasons for the species decline.

The shortnose sturgeon lives in both fresh and saltwater environments. The adult shortnose sturgeon remains in freshwater all year and only briefly enters low salinity river reaches during the summer months. The movement to estuarine waters may be due to an increase in prey. One of the fish's sensitive life stages, spawning, is connected to river temperature. Spawning occurs when river temperature increases in the spring. In the Delaware River shortnose sturgeon spawn near Scudders Falls north of Lambertville, New Jersey and not in the State of Delaware.

The shortnose sturgeon is a benthic omnivore that continuously feeds on crustaceans, insect larvae, worms, and mollusks. According to the recovery plan, shortnose sturgeon are affected by dredging, pollutant discharges and impingement from intake structures, and bridge and dam construction, but could also be impacted by commercial and recreational fishing, contaminants and low dissolved oxygen.

Reptiles:
Of the six listed turtles, five are saltwater and one is freshwater species. The oceanic turtles (*Chelonia mydas* and *Caretta caretta* are listed as threatened, *Eretmochelys imbricata*, *Dermochelys coriacea* and *Lepidochelys kempi* are listed as endangered) are migratory, moving along the mid-Atlantic coast, following warm water. During the summer months the turtles migrate north to the Maryland and Virginia coasts and beyond. Some of the critical habitat to protect are the turtle's nesting grounds. The turtles eat crustaceans as well as jellyfish, sea urchins, sponges, squid, and fish. The threats to the turtles are incidental takes, pollution, and marine habitat degradation.

There is no information that the oceanic turtles nest in Delaware. The turtles are primarily summer visitors in the coastal waters.

The bog turtle (*Clemmys muhlenbergii*) is listed as threatened in Delaware. A recovery plan was developed for this species in 2001. Bog turtles live in relatively open portions of sphagnum bogs, swamps or marshy meadows with slow moving, spring fed streams or spring runs with soft bottoms. The primary reason that bog turtles are threatened is the draining or other destruction of their habitat. Also, many have been illegally removed for commercial purposes.

Birds:
There are three birds listed for the State, but only two are known to occur presently. The bald eagle (*Haliaeetus leucocephalus*) is listed as threatened, and occurs throughout the entire State. Pesticides, most notably DDT, contributed to the decline in the population of eagles. Since the banning of these pesticides there have been increases to the population. Protection of nesting habitat is also critical to the protection of the species.

The piping plover (*Charadrius melodus*) is also listed as threatened, and is found in Sussex County. According to the recovery plan, the major causes of the current downtrend in piping plover population are habitat loss and degradation, disturbance by humans and domestic animals, and increased predation.

Mammals:
There are six whales (*Balaenoptera musculus*, *Balaenoptera physalus*, *Megaptera novaeangliae*, *Eubalaena spp.*, *Balaenoptera borealis* and *Physeter catodon*) listed as endangered for the State. Decline of the whale population is do mostly to hunting, but international treaties now in place have contributed to recovery. The populations are still threatened by ship collisions, entrapment or entanglement in fishing gear, habitat degradation and disturbance by vessels.

The Delmarva fox squirrel (*Sciurus niger cinereus*) has been located in Sussex County, Delaware. The fox squirrel is found in pine and oak forests, therefore, destruction of forest habitat due to development is a threat to the fox squirrel. The fox squirrel relies on the forest to

provide food (nuts, seeds, and fruit) and provide shelter in the tree hollows. No effects are expected from this action on this squirrel species.

Delaware's Regulations Governing the Control of Water Pollution:

The purpose of the Regulations Governing the Control of Water Pollution (the Regulations) is to ensure that the surface and ground waters of the State of Delaware exhibit a quality that is consistent with established criteria. These regulations seek to prevent, mange, and/or control the pollution from activities that affect or have the reasonable potential to affect the quality of these waters.

The Regulations include thirteen sections:

Section	Title
1	Authority, Purpose and Scope
2	Definitions
3	Coverage, Prohibitions, Exemptions and Exclusions
4	Pollution Control Facilities Construction and Operation Permits
5	Water Quality Certification
6	NPDES Program
7	Technology-Based Requirements
8	Water Quality-Based Requirements
9	The General Permit Program
10	Municipal Compliance Maintenance
11	Pollution Prevention
12	Enforcement and Penalties
13	Severability

The section titled "The General Permit Program" was redesignated as Section 9 during this regulation modification. This portion of the regulation was adopted June 30, 1993, and revised in 1998, but remained unchanged in content. Therefore, this evaluation will not address this section.

Determination:

EPA is prepared to approve Delaware's revised regulation, and we have determined that our approval action will not adversely affect threatened and endangered species and their critical habitat in the State of Delaware. Any point source discharge has the potential to impact threatened and endangered species, but that impact is mitigated by one significant factor. The 1983 Memorandum of Agreement (MOA) between the Department of Natural Resources and Environmental Control (DNREC) and EPA established the terms, responsibilities and procedures by which the NPDES program would be operated by DNREC. In that MOA, DNREC is required

to transmit to EPA a copy of each draft NPDES permit at the time of issuance of public notice. EPA then has 30 days to comment upon, object to, or make recommendations with respect to the draft permit. If EPA objects, the State cannot issue the permit until EPA's objection is addressed.

Although EPA waives its right to comment on some permits, such as minor discharges, we can also terminate that waiver, in whole or in part, at any time. We provide this information so that the Services understand that, on a permit-by-permit basis, we have authority to object to a permit should we find that it may adversely affect a threatened or endangered species.

Delaware's regulation at Section 6.31.c. specifies that when Delaware public notices the receipt of a complete application for a NPDES permit, a copy of that notice is mailed to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. If the Services and EPA determine that a point source discharge will have a detrimental effect on Federally-listed species or critical habitat, we would follow the procedures outlined in Part IX of the MOA between EPA and Services.

Description of Regulation and Manner in Which it May Affect Listed Species

The following section will give a brief description of the content of each section of Delaware's NPDES regulation and present some discussion on how the regulation may affect threatened and endangered species.

Section 1 - Authority, Purpose and Scope
Section 5 - Water Quality Certification
Section 13 - Severability

These sections are strictly administrative or specify application requirements and has no impact on Federally listed threatened and endangered species and their critical habitat in Delaware.

Section 2 - Definitions

The definitions will not be reviewed individually, but rather these terms will be addressed with the provisions in which they appear, if necessary.

Section 3 - Coverage, Prohibitions, Exemptions and Exclusions

This section addresses what activities are governed by these regulations, what types of activities and discharges are absolutely prohibited, what activities are exempted from seeking a permit, and identifies what may not normally require a permit, but could if they are found to be a source of pollutants. EPA finds that our approval of this section may affect, but will not adversely affect, Federally listed threatened and endangered species and their critical habitat in Delaware. Our finding is based on the fact that by regulating the most pertinent discharges to meet technology

based and water quality based, the State is protecting surface water and the organisms that live there. In cases where an activity is excluded, the State does note that it could permit an excluded activity if they find that the activity is a source of pollutants to State waters, involved a discharge of pollutants to State waters or has the potential to discharge pollutants to waters of the State.

Section 4 - Pollution Control Facilities Construction and Operation

This section of the regulations governs the construction, installation, replacement, modification, operation or use of any equipment or device or other article which may cause or contribute to the discharge of a pollutant into any surface waters. As in Section 3, we find that our approval of this section may affect, but will not adversely affect, Federally listed threatened and endangered species and their critical habitat. Our finding is based on the fact that the requirements in this section are designed to minimize the impact to a surface water from the construction and operation of a pollution control facility.

Section 6 - The National Pollutant Discharge Elimination System (NPDES) Program
Section 7 - Technology-Based Requirements
Section 8 - Water Quality-Based Requirements

These sections represent the meat of what EPA is reviewing and intends to approve. Federal regulation at 40 CFR 123.25 defines all of the aspects of the legal authority a state program must have in order to implement the NPDES program. Many of these requirements are administrative, such as permit application requirements, and would not affect threatened and endangered species. Other aspects, such as Delaware's regulations regulating concentrated animal feeding operations, could have an impact on threatened and endangered species. Where an impact is possible is where it is imperative that the Services and EPA work together to remedy any detrimental effects.

Note that in Section 6.15, the regulation specifies that each NPDES permit shall require compliance with effluent limitations and standards, or any more stringent limitations, including those necessary to meet water quality standards. In other words, if a limit is required for a parameter, either the technology-based or the water quality-based limitation would be applied, whichever was more stringent.

Section 6.17 addresses schedules of compliance. Schedules of compliance could be of concern in areas where threatened and endangered species can be found, in that a permittee can be allotted time to bring its discharge into compliance with applicable standards and limitations. The resulting exceedances could adversely impact threatened and endangered species. Any impact could be addressed through permit-by-permit reviews. If threatened and endangered species are present in the area of a discharge where a compliance schedule is assigned, EPA could object to the permit if that compliance schedule would adversely impact such species.

Section 6.22 discusses the State's discretion to grant or deny a variety of variance requests. All

of the variances are based on CWA authority and include: Sections 301(i) (construction is required in order for a planned or existing POTW to achieve limitations, but construction cannot be completed in the time required, or Federal financial assistance was not made in time); 301(k) (a facility proposes to comply with the requirements of the CWA by replacing existing production capacity with an innovative production process which will result in significantly greater effluent reductions); 316(a) (any effluent limitation proposed for the control of the thermal component of any discharge from such sources will require effluent limitations more stringent than necessary to assure the projection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made); 301(c) (in some cases, permit requirements can be modified if they will represent the maximum use of technology within the economic capability of the facility, and will result in reasonable further progress toward the elimination of the discharge of pollutants), and; 301(g) (fundamentally different factors). In all of these cases, if the variance is granted, EPA has a distinct review and approval role, and in some cases, like 316(a) variances, the State forms workgroups that could involve the Services.

Part III of Section 6 provides in detail the public comment and hearing procedures the State will follow in the issuance of a permit. This part is largely administrative and has no impact on Federally listed threatened and endangered species and their critical habitat in Delaware. As noted above, this is the part of the regulation that specifies that the Services will be provided with notice at the time a public notice is issued pursuant to Section 6.30. This is the opportunity for the Services to notify EPA of any threatened and endangered species that may be impacted by a discharge.

Part IV of Section 6 specifies the monitoring requirements that a permittee must fulfill in order to ensure compliance with an issued permit. EPA finds that our approval of this part will not adversely affect threatened and endangered species in Delaware, and indeed may be beneficial. We make this finding because in any case where a permit has been issued for a discharge to a stream that has threatened and endangered species, that permit has been found to be protective of those species. Therefore, it is imperative that the discharge be monitored to ensure that it is complying with all requirements of the permit.

Part V of Section 6 details the permit modification, revocation and reissuance, and termination procedures the State will utilize. This part is also administrative and has no impact on Federally listed threatened and endangered species and their critical habitat in Delaware.

Part VI of Section 6 administers a number of special NPDES program requirements for a number of certain categories of point source discharges. These include: Animal production operations; concentrated aquatic animal production facilities; aquaculture projects; new source and new dischargers; and, silvicultural activities. Impacts on threatened and endangered species can be addressed on a permit-by-permit basis.

The State's Pretreatment requirements are specified in Part VII. As pretreatment is the control of

introduction of pollutants into a publicly owned treatment works (POTW) and results in no discharge to surface water, EPA's approval of this section will have no impact on threatened and endangered species and their critical habitat in the State of Delaware.

Section 7 of Delaware's NPDES regulation are the technology-based requirements. The regulations state that "(a)t a minimum, any discharge of liquid waste...to State waters shall be subject to effluent limitations, discharge requirements and any alternate effluent control strategy that reflect a practicable level of pollutant removal technology. For the purposed of this section, a practicable level of pollutant removal technology is defined as the application of the "best" treatment technology, control measures and practices, including pollution prevention, available to prevent, manage, reduce or remove pollutants taking into account the cost of applying such technology, control measure, pollution prevention or other practices in relation to the effluent reduction benefits to be achieved, the age of equipment and facilities involved, the process(es) employed, the engineering aspects of applying the various types of controls, process changes, pollution prevention measures, non-water quality impacts...and other factors deemed appropriate." The concern with technology-based requirements is that because they consider cost and economic achievability, they may not be protective of the biological communities at the point of discharge. However, Section 6.15 provides that if a water quality standard is more stringent than technology-based requirements, and vice versa, the more stringent of the two will prevail. As the water quality standards do take into consideration the protection of biological communities, and the threatened and endangered species that reside there, we find that our approval may impact, but will not adversely impact threatened and endangered species in Delaware.

Section 8 of Delaware's NPDES regulation is the water quality-based requirements. This section requires that additional effluent limitations and treatment requirements must control all pollutants or pollutant parameters which may be discharged at a level which will cause, have the reasonable potential to cause or to contribute to an excursion of any numerical or narrative water quality criterion contained within Delaware's Surface Water Quality Standards.

Section 8.02 deals with water quality-based effluent limits for single discharges, in a stream with no other point or nonpoint source of pollution. In cases where a discharge would have the reasonable potential to exceed water quality standards for a parameter, and there is a numeric water quality criterion, the permit must contain the appropriate water quality-based effluent limit. Provided that the water quality criterion had been deemed protective of threatened and endangered species, EPA's approval of this section may affect, but will not adversely affect threatened and endangered species in Delaware. If the water quality criterion has been found not to be protective, that would have to be addressed through the water quality standards process, but in any case could be addressed through permit comment and objection.

Section 8.03 discusses Delaware's intent to address reasonable potential findings for one or more discharges in combination with nonpoint source pollution through the Total Maximum Daily Load (TMDL) process. In Delaware, all State developed TMDLs are provided to the Services for

comment prior to EPA's approval, and if the Services were to identify a detrimental effect at that point, any concerns would be addressed at that time. EPA developed TMDLs are not regulated by the State and are not discussed in this evaluation.

The remainder of Section 8 addresses conditions applicable in specified cases. These include: Requests for increased discharge or change in discharge location; effluent limitations below quantifiable levels; consideration for pollutants corroded and eroded from water distribution piping and appurtenances or noncontact cooling water condenser tubes; and, consideration for pollutants in intake waters when assessing reasonable potential. Requests for increased discharge or change in discharge location essentially require a permittee who seeks to do so to demonstrate that the discharge will not result in violation of Delaware's Surface Water Quality Standards. EPA's approval of this section may affect, but will not adversely affect threatened and endangered species. We base this finding on the fact that any modification to a permit, such an increased discharge, would require public notification and EPA review. If EPA found that the increased discharge or change in discharge location would result in an adverse impact to biological communities, we would use our objection authority.

In order to address effluent limitations below quantifiable levels (Section 8.04(b)), Delaware would use Minimum Analytical Levels (MAL), defined as the lowest concentration of a substance that can be quantified within specified limits of interlaboratory precision and accuracy under routine laboratory operating conditions in the matrix of concern, as a temporary measure to determine compliance with effluent limitations. The use of MALs may adversely affect threatened and endangered species in that if a parameter of concern cannot be adequately quantified, a species may be at risk even though the MAL shows compliance. However, the use of MALs can be mitigated by the use of EPA's objection authority when it is found that MALs would not be protective of the sensitive species found at the discharge site.

If a facility exceeds water quality criteria due to pollutants corroded and eroded from water piping at a facility, the facility can pursue one of two options. First, they could seek a variance from water quality criteria. The regulation specifies very specific conditions that a facility must meet in order to qualify for such a variance. If they were to qualify, the EPA must review and approve as a water quality standards modification. As such, an approval would require concurrence from the Services that EPA's approval would not adversely affect threatened and endangered species.

The other option would be a compliance schedule that would allow the facility to replace piping to the point that the facility met water quality criteria. As with other compliance schedules, if threatened and endangered species are present in the area of a discharge where a compliance schedule is assigned, EPA could object to the permit if that compliance schedule would adversely impact such species.

In the case of intake credits (Section 8.04(d)), Delaware could determine there is no reasonable

potential for the discharge to cause or contribute to the exceedance of a criterion where the quality of a facility's intake water causes the exceedance. As with consideration for erosion and corrosion, there is a specific set of conditions that a discharger must meet in order to qualify for intake credits. In cases where the intake water is from the same stream basin as that of the receiving stream, as this is simple pass through, threatened and endangered species would not be adversely impacted. However, this provision does allow for water purchased from a water utility, water pumped from wells, or water pumped from a stream basin different from that receiving the discharge. In these cases, the discharger must either establish a site-specific criterion that demonstrates that a less-stringent criteria will adequately protect the receiving water, or establish a variance. In either case, site-specific criteria or variance, EPA would review and approve the change as a modification to water quality standards. As such, an approval would require concurrence from the Services that EPA's approval would not adversely affect threatened and endangered species.

Section 10, Municipal Compliance Maintenance, and Section 11, Pollution Prevention, recognize the importance of pollution prevention. Both sections allow for additional protections above that required by Federal regulation, and EPA finds that our approval may affect, but will not adversely affect threatened and endangered species. Our finding is based on the premise that by encouraging pollution prevention, the State is in effect improving the water quality.

Section 12 of Delaware's NPDES regulation specifies the State's enforcement authority. EPA finds that our approval of this section will affect, but will not adversely affect, threatened and endangered species. We base this finding on that fact that effective use of enforcement authority, and accompanying penalties, will encourage permittees to adhere to the terms of their permits, correct any compliance problems, and penalize those that do not. These activities will result in the protection of water quality in the State.

Conclusion:

EPA plans to approve Delaware's revised NPDES regulation, and we have determined that our approval action will not adversely affect threatened and endangered species and their critical habitat in the State of Delaware. Our finding is based mainly on EPA's authority to object to State-issued permits should we find, with the Services assistance, that the discharge will have detrimental effects on Federally-listed species.

References:

1) U.S. Fish and Wildlife Service. 1991. First Update of the Peregrine Falcon (Falco peregrinus), Eastern Population, Revised Recovery Plan. Newton Corner, Massachusetts.

2) Excerpts from Biological Opinion on sea turtles.

3) National Marine Fisheries Service. 1998. Recovery Plan for the Shortnose Sturgeon

(Acipenser brevirostrum). Prepared by the Shortnose Sturgeon Recovery Team for the National Marine Fisheries Service, Silver Spring, Maryland.

4) U.S. Fish and Wildlife Service. 1991. Swamp Pink (Helonias bullata) Recovery Plan. Newton Corner, Massachusetts.

5) Endangered and Threatened Species of Southeastern United States (The Red Book) FWS Region 4

6) U.S. Fish and Wildlife Service. 2001. Bog Turtle (Clemmys muhlenbergii), Northern Population, Recovery Plan. Hadley, Massachusetts.

7) U.S. Fish and Wildlife Service. 1996. Piping Plover (Charadrius melodus), Atlantic Coast Population, Revised Recovery Plan. Hadley, Massachusetts.

8) National Marine Fisheries Service. 1991. Recovery Plan for the Northern Right Whale (*Eubalaena spp.*). Silver Springs, Maryland.

9) National Marine Fisheries Service. 1991. Recovery Plan for the Humpback Whale (*Megaptera novaeangliae*). Silver Springs, Maryland.

10) National Marine Fisheries Service. 1998. Recovery Plan for the Blue Whale (*Balaenoptera musculus*). Silver Springs, Maryland

11) National Marine Fisheries Service. 1998. Draft Recovery Plan for the Fin Whale (*Balaenoptera physalus*) and Sei Whale (*Balaenoptera borealis*). Silver Springs, Maryland

12) National Marine Fisheries Service and U.S. Fish and Wildlife Service. 1993. Recovery Plan for the Hawksbill Turtle (*Eretmochelys imbricata*) in the U.S. Carribean, Atlantic and Gulf of Mexico. National Marine Fisheries Service, St. Petersburg, Florida.

13) U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1992. Recovery Plan for the Kemp's Ridley Sea Turtle (*Lepidochelys kempi*). National Marine Fisheries Service, St. Petersburg, Florida.

14) National Marine Fisheries Service and U.S. Fish and Wildlife Service. 1991. Recovery Plan for U.S. Population of Loggerhead Turtle. National Marine Fisheries Service, Washington, D.C.

15) National Marine Fisheries Service and U.S. Fish and Wildlife Service. 1992. Recovery Plan for Leatherback Turtles in the U.S. Caribbean, Atlantic and Gulf of Mexico. National Marine Fisheries Service, Washington, D.C.

16) National Marine Fisheries Service and U.S. Fish and Wildlife Service. 1991. Recovery Plan for U.S. Population of Atlantic Green Turtle. National Marine Fisheries Service, Washington, D.C.

Attachments:

1) List of threatened and endangered species in Delaware, June 2003 (2 pages).

2) "Regulations Governing the Control of Water Pollution." Amended May 14, 2003. State of Delaware Department of Natural Resources and Environmental Control.